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Issue Date: 04 April 2008

Case No.: 2008-TLC-00023

ETA Case No.: A-08070-0629

In the Matters of:

BILLY R. EVANS
d/b/a
OKEE B, INC.
Respondent

BEFORE: JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

These matters arise under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §1101(a)(15)(H)(ii)(a), and its implementing regulations, found at 20 C.F.R Part 655.¹ This Decision and Order is based on the written record, consisting of the Employment and Training Administration Appeal File ("AF"), and the written submissions from the parties. §655.112(a)(2).

Statement of the Case

Billy R. Evans d/b/a Okee B Inc. ("Respondent") filed an H-2A application (ETA Case No. A-08070-0629) with the Region III Regional Administrator ("RA") of the U.S. Department of Labor, Employment and Training Administration on March 10, 2008. (AF 26-29). In the application, the Respondent sought to hire seventy five agricultural alien workers from April 25, 2008 through November 20, 2008. (AF 28). The RA reviewed the application and issued a modification letter on March 17, 2008. (AF 9-12). The modification letter required Respondent to provide, inter alia, the correct notice of Workers Compensation Insurance coverage, a legible

¹ Unless otherwise noted, all regulations cited in this decision are in Title 20.

Farm Labor Contractor Certificate of Registration (“FLCR”), a more specific guarantee of employment from the farm on whose fields the workers would be harvesting and packing corn, and a more definite description of the worksite location. (AF 21-22). Instead of providing the information the RA requested, Respondent chose to appeal, and notified the Office of Administrative Law Judges on March 20, 2008. (AF 1-3).

Respondent has requested an expedited review of its application pursuant to §655.112(a). (AF 1). The parties were given until noon on April 1, 2008 to file any briefs or position papers and were informed that no additional evidence would be accepted with those briefs pursuant to the regulations. §655.112(a)(2).

Discussion

In this case, the RA requested the Respondent to provide the correct notice of Workers Compensation Insurance coverage, a legible FLCR, and a more definite description of the worksite location. The Respondent objected to providing the documents and requested an expedited administrative review of its application. Based upon my review of the record for legal sufficiency, I find that the RA has set forth a legally sufficient basis for denying this application for temporary alien agricultural certification (for H-2A workers). Conversely, the Respondent has not asserted a legally sufficient basis for the application to be granted. Accordingly, I must affirm the RA’s denial of temporary alien labor certification.

First, I note that the Respondent attached new evidence to its request for expedited review.² According to the regulations, new evidence may not be accepted by the administrative law judge when a request for expedited review has been filed. § 655.112(a)(1). As this evidence had not been provided to the RA prior to the appeal, it cannot be reviewed now. Accordingly, this evidence is excluded from the record.

The Respondent argues that it is compliance with the requirements as to proof of Workers Compensation Insurance coverage. However, the Respondent admitted that he did not file the

² On March 23, 2008, Okee B sent to the court a number of documents, including the same letter submitted to the RA from Bishwell Farms with new comments signed by an officer of Okee B.

correct Workers Compensation Insurance information. Per 20 C.F.R. 655.102(b)(2) an employer must provide proof of Workers Compensation Insurance coverage that is issued to the same employer listed on the ETA 750, Item 4 and ETA 790, Item 1. The Workers Compensation Certificate of Liability Insurance provided by the Respondent with its application does not list Billy R. Evans d/b/a Okee B, Inc. as the insured. (AF 11). The RA reasonably requested the Respondent to submit proof of Workers Compensation Insurance coverage issued to Billy R. Evans d/b/a Okee B, Inc. Proof of Workers Compensation Insurance coverage must be provided to the National Processing Center before certification can be granted.

The Respondent argues that there is no requirement listed in the Code of Federal Regulations requiring an employer to obtain a FLCR as described by the RA. However, according to 20 C.F.R. 653.104(b), a contractor that is going to transport workers under its provisions must provide a valid FLCR before an application may be received. Without such an application, a contractor is not eligible to file an H-2A application. *See* ETA Handbook No. 398 Page II-24. The RA reasonably requested the Respondent to provide a valid FLCR with authorization to house and transport workers, an expiration date that is legible without magnification, the beginning and ending dates of employment, the number of workers required, and the address of worksite locations. The Respondent's application included a FLCR, however the expiration date was not legible. As a result, the RA was not able to determine if the FLCR was valid. Additionally, the FLCR did not specify the number of workers required, the address of the worksite locations, or the specific beginning and ending dates of harvest. As Respondent did not provide a FLCR that was complete or legible enough to determine its validity, certification must be denied.

The Respondent also argues that the addresses of the worksite locations are not required by the Code of Federal Regulations. However, according to 20 C.F.R. 655.101(b), the employer must provide certain information in order for the DOL to make its certification determination on the acceptability of the application. Specifically, all items on ETA Form 750 and ETA Form 790 requesting identifying information about the employer, such as the employer's name, address, telephone number, dates of need and number of workers requested must be completed. The worksite location listed in Item 2 of ETA 790 is listed as the Bainbridge area instead of providing the fixed worksite locations. The RA reasonably requested that the Respondent modify

his application to include the cited information required by 20 C.F.R. 655.101(b) with specificity. Where the RA requests documentation or information which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it and failure to produce such documentation or information will result in the denial of certification. *GenCorp*. 1987-INA-659 (Jan. 13, 1988)(*en banc*).

In sum, the Respondent did not provide the RA with proof of Workers Compensation Insurance coverage, a legible FLRC that can be determined to be valid, and the specific address of the worksite locations. The RA informed the Respondent of the deficiencies in his application and afforded him the opportunity to modify his application. Instead of modifying its application and submitting the requested documents, the Respondent chose to challenge the RA's requested modifications as being arbitrary. The RA was fully authorized to request the modifications before accepting the Respondent's application. The RA correctly cited to the relevant and applicable regulatory violations in the Code of Federal Regulations as it pertains to temporary labor certification and therefore appropriately denied certification.

A

JOHN M. VITTON
Chief Administrative Law Judge